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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 0 8 2010

LIN 06 174 51769

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a separate finding of fraud. The labor certification will also be invalidated based on the petitioner's and the beneficiary's fraudulent misrepresentations.

The petitioner claims to be a child daycare center. It seeks to permanently employ the beneficiary in the United States as a market research analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's November 21, 2006 denial, the primary issues in this case are whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and whether the beneficiary is qualified to perform the duties of the offered position as set forth in the labor certification. The AAO will also consider whether the petitioner and the beneficiary willfully misrepresented material facts in this proceeding.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1]Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2]An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

[3]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. In order to classify the beneficiary in this employment-based preference category, the petitioner must establish that: the labor certification requires an advanced degree professional;[4] the beneficiary is an advanced degree professional;[5] and the beneficiary meets the requirements of the job offered as set forth in the labor certification.[6]

In addition, the petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the February 3, 2006 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is $37,000 per year. On the petition, the petitioner claims to have been established in 2005 and to employ seven workers. According to the petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return, the petitioner is structured as a C corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

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[4] 8 C.F.R. § 204.5(k)(4).

[5] 8 C.F.R. § 204.5(k)(3).

[6] 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The record does not contain a 2006 Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary. However, the petitioner's 2006 tax return states that the beneficiary is the sole owner of the petitioner, and that she received $20,460.00 in compensation in 2006.[7] Therefore, the petitioner must establish its ability to pay the beneficiary the $16,540.00 difference between the $37,000 proffered wage and the $20,460 actual wage paid.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

[7]This salary is corroborated by other evidence in the record, including copies of pay stubs issued by the petitioner to the beneficiary, wage and withholding reports submitted to the State of California, internally generated quarterly wage reports, and the petitioner's Forms 941, Employer's Quarterly Federal Tax Return.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's 2006 tax return states that its net income was -$38,570.00.[8] Therefore, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, added to the wages paid to the beneficiary during the period, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[9] If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's 2006 tax return states that the petitioner had net current assets of $37,379.00.[10] Therefore, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through the wages paid to the beneficiary and its net current assets. Accordingly, the director's decision on this issue is withdrawn.

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[8]For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

[9]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[10]On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

The director's decision also concludes that the beneficiary does not meet the requirements of the offered position. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *see also Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4. Education: master's degree in business administration
H.5. Training: none required
H.6. Experience: none required
H.7. Alternate field of study: none accepted
H.8. Alternate combination of education and experience: bachelor's degree and five years of experience in the job offered
H.9. Foreign educational equivalent: accepted
H.10. Experience in an alternate occupation: none accepted
H.14. Specific skills or other requirements: none required

The record of proceeding contains the beneficiary's diploma and transcripts for a four-year bachelor of law degree from Fu Jen Catholic University, Taiwan. The record also contains an employment experience letter executed by [redacted], founder and coordinator of Child's World in Taiwan, dated October 17, 2005. The letter states that the company employed the beneficiary as a financial manger/market analyst from March 1987 to March 2004.

The record also contains a foreign academic credentials evaluation report by [redacted] of [redacted] dated December 15, 2005 ([redacted]). The evaluation states that the beneficiary's bachelor of law degree "is the equivalent of the U.S. Bachelor's degree (in a major not offered at the undergraduate level in the United States) awarded by a regionally accredited university in the United States." The record contains a work experience evaluation report by [redacted] professor and consultant to [redacted], dated December 15, 2005 ([redacted]). The [redacted] states that the beneficiary's bachelor of law degree, together with her "seventeen years of professional work experience in the field of business are equivalent to the U.S. degree of Master of Business Administration."

The labor certification in the instant case requires the beneficiary to possess either a master's degree in business administration or a bachelor's degree in business administration and five years of experience in the job offered. The beneficiary does not have a master's degree. Instead, she arguably possesses the equivalent of a master's degree based on a combination of education and

experience. However, the express terms of the labor certification do not permit the beneficiary to qualify for the offered position with a combination of education and experience equating to a master's degree. The beneficiary also does not possess a bachelor's degree in business administration. Instead, the [redacted] states that the beneficiary's bachelor's degree is in a field not offered at the undergraduate level in the United States. Again, the express terms of the labor certification do not permit the beneficiary to qualify for the offered position with a degree in any field of study other than business administration.

Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the petition was correctly denied by the director on this issue. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

Beyond the decision of the director, it also appears that the beneficiary is the sole owner of the petitioner. Specifically, the record contains several documents which state that the petitioner is owned and managed by the beneficiary:

- Schedule E of the petitioner's 2006 tax return states that the beneficiary is the 100% owner of the petitioner and devotes 100% of her time to the business.
- The petitioner's Articles of Incorporation, *which were filed by counsel*, state that the beneficiary is the corporation's agent for service of process.
- The document establishing the petitioner's business premises is a lease assignment from the prior tenant to '[redacted]'[1]
- The petitioner's Registration Form for Commercial Employers filed with the State of California, dated September 27, 2005, states that the beneficiary is the president of the petitioner.
- The petitioner's Fictitious Business Name Statement filed with the San Diego County Clerk's office is signed by the beneficiary, and she lists her title as "Director."
- The petitioner's Certificate of Payment of Business Tax is addressed to the beneficiary.
- The petitioner's Statement of Information (Domestic Stock Corporation) states that '[redacted]' is the petitioner's CEO, CFO and a director.
- It is also noted that the petitioner is named '[redacted]'

Therefore, it is clear from the evidence in the record that the beneficiary owns and manages the

[1]The record contains the beneficiary's Form G-325A, Biographic Information, which was submitted with her concurrently-filed application for adjustment of status. On the Form G-325, the beneficiary states under the section for "all other names used" that she also goes by '[redacted]'

petitioner.

Section C.9 of the labor certification asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien." The employer should have answered the question "yes." However, the answer to this question on the labor certification is "no."[12] The beneficiary, the petitioner and counsel all signed the labor certification under penalty of perjury.

In addition, the record contains an offer of employment letter issued to the beneficiary by the petitioner for the position of school manager. The letter is signed by [redacted] as the employee, and by [redacted] as the school owner. Even though [redacted] and [redacted] are the same individual, there was clearly an effort to make the signatures look different, including using a different slant for each signature.

Therefore, it also appears that the petitioner, the beneficiary and counsel took affirmative steps to disguise the fact that the beneficiary owns the petitioner.

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l), which states:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
>
> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
>
> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
>
> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

[12]It is noted that counsel incorporated the petitioner for the beneficiary, and therefore had first-hand knowledge that the beneficiary owns the petitioner.

A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). By failing to check the appropriate box on the labor certification, the DOL was not allowed an opportunity to audit and assess the extent of the alien's influence and control over the job opportunity.

Further, the intentional failure to disclose the beneficiary's relationship to the petitioner constitutes willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(c)(i) of the Act states:

> In General – Any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.

Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision."). Here, the omission of the beneficiary's status as the owner of a small corporation, is a willful misrepresentation that adversely impacted DOL's adjudication of the labor certification.

Furthermore, a finding of misrepresentation result in the invalidation of the labor certification. The regulation at 20 C.F.R. § 656.31(d) states:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By failing to identify that the relationship between the petitioner and the beneficiary, the petitioner and the beneficiary seek to procure a benefit provided under the Act through willful misrepresentation of a material fact. Further, this entire proceeding is based upon a misrepresentation: the beneficiary is the owner and director of the petitioner, and serves in that capacity. The petitioner never intended to employ the beneficiary as a market research analyst. It is also noted that the Form G-325A discussed in footnote 11, *supra*, states that the beneficiary has been employed by the petitioner as a market research analyst since September 2005. This is also clearly not accurate.

The beneficiary's and the petitioner's material misrepresentations were a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The willful misrepresentations

outlined above adversely impacted DOL's adjudication of the labor certification and USCIS's adjudication of the instant petition.

In light of the above, the petition cannot be approved, and the labor certification will be invalidated pursuant to 20 C.F.R. § 656.31(d).[13]

ORDER: The appeal is dismissed. The labor certification is invalidated on the ground that the petitioner sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact.

[13]The record contains two labor certifications filed by the petitioner on behalf of the beneficiary. The labor certification pertaining to the instant petition is ETA Case Number [redacted] The labor certification pertaining to petition LIN-07-248-55218 (which was abandoned on November 7, 2008) will also be revoked.